

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

LOUISIANA PUBLIC SERVICE COMMISSION,
EX PARTE

Docket No. R-34054, In re: Rulemaking to examine the Commission's Rules of Practice and Procedure related to a motor carrier of waste proving public convenience and necessity when applying for a common carrier certificate or contract carrier permit, as well as possible adoption of rules and regulations specific to applications for common carrier certificates or contract carrier permits as it relates to hauling waste

(Decided at the December 20, 2017 Business and Executive Session)

This General Order repeals and reenacts Rule 33 and Rule 34 of the Rules of Practice and Procedure of the Louisiana Public Service Commission and supersedes General Order dated May 30, 2012 (R-30297) and October 18, 2017 (R-34054).

I. Background

Docket No. R-34054 was originally opened pursuant to a Commission Directive issued at the April 28, 2016 Business and Executive Session ("B&E") directing Commission Staff to examine exempting motor carriers of waste from having to prove public convenience and necessity when applying for a common carrier certificate or contract carrier permit. The initial notice for this docket was published in the Commission's May 6, 2016 Official Bulletin. The "in re" contained in the original publication was as follows:

Amendments to Rule 33 of the LPSC's Rules of Practice and Procedure to remove the requirement for motor carriers of waste to prove public convenience and necessity, while maintaining the requirement to prove fitness to operate.

In response to the Original publication, timely interventions and initial comments were received from the following: Roy Bailey Construction, Inc.; Stranco, LLC; Stafford Transport of Louisiana, Inc. d/b/a CEI; Sprint Waste Service, LP; Vanguard Vacuum Trucks, LLC; Gulf Coast Responders, LLC; CNC Oilfield Services; G&C Construction International, LLC d/b/a G&C Energy Services; F.A.S. Environmental Services, LLC and Deepwell Energy Services, LLC. In addition to the aforementioned intervenors, interested party filings and/or requests to be added to the service list were submitted by the following law firms: Parker Strauss, LP; Marionneaux Kantrow, LLC, and Roedel Parsons.

An initial request for comments was issued, after which Staff counsel issued a Proposed Staff Recommendation ("8/3/2016 Recommendation") on August 3, 2016. The 08/03/2016 Recommendation provided an overview of the historical concept of public convenience and necessity ("PC&N"), and its ultimate application in Motor Carrier regulation. The 08/03/2016 Recommendation ultimately recommended that the Commission modify existing Rule 33 of the

Rules of Practice and Procedure to eliminate the requirement that a waste hauler be required to prove PC&N.

Comments were submitted in response to the 08/03/16 Recommendation jointly by Roy Bailey, Stranco and CEI, jointly by G&C Construction, G&C Energy and Deepwell, and jointly by Sprint, Vanguard and Gulf Coast Responders. The docket remained dormant for some time following receipt of these comments. In an effort to re-engage parties, Staff issued a request for additional comments, and noticed a technical conference on February 21, 2017.

The technical conference was attended by representatives for a number of the intervenors and interested parties in this docket. Proposed Rules and Regulations were circulated at the technical conference for discussion purposes. Comments were received by a number of parties on those Proposed Rules and Regulations. Additionally, Hine Environmental Waste Service, LLC (“Hine”), a party that had not previously intervened, filed specific comments in response to the Proposed Rules and Regulations.

Due to concerns regarding the scope of the docket, and potential notice issues raised by intervenors, Docket No. R-34054 was re-published in the Commission’s April 4, 2017 Official Bulletin with the following amended “in re”:

Rulemaking to examine the Commission’s Rules of Practice and Procedure related to a motor carrier of waste proving public convenience and necessity when applying for a common carrier certificate or contract carrier permit, as well as possible adoption of rules and regulations specific to applications for common carrier certificates or contract carrier permits as it relates to hauling waste. (This docket is being republished to clarify the scope of the rulemaking and to allow any interested party to intervene).

On May 5, 2017, Staff issued its Final Recommendations and Draft Rules and Regulations (“05/05/2017 Recommendation”), which still required that an applicant prove both fitness and PC&N, but set forth the specific factors required to make such a showing. Staff’s 05/05/2017 Recommendation was considered at the Commission’s May 19, 2017 B&E. Commissioner Skrmetta made a motion to adopt Staff’s 05/05/2017 Recommendation. The motion died for lack of a second. After discussion, on motion of Commissioner Campbell, seconded by Commissioner Boissiere, with Vice Chairman Skrmetta and Chairman Angelle concurring, and Commissioner Francis recusing himself due to a conflict of interest, the Commission voted to defer the consideration of Staff’s 05/05/2017 Recommendation to the June 23, 2017 B&E.

On May 24, 2017, Staff issued a Request for Specific Comments regarding the 05/05/2017 Recommendation, with any additional comments being accepted until June 5, 2017. In response to this request, Staff received four sets of comments from the following: 1) Louisiana Mid-Continent Oil and Gas Association; 2) Marionneaux Kantrow, LLC; 3) Roy Bailey Construction, Inc., Stranco, LLC, and Stafford Transport of Louisiana, Inc. d/b/a CEI; and 4) G&C Construction International, LLC d/b/a G&C Energy Services and Deepwell Energy Services, LLC. In response to comments received after the May 24, 2017 B&E, Staff issued its Amended Final Recommendation and Draft Rules and Regulations on June 9, 2017 (“06/09/2017 Recommendation”).

Staff’s 06/09/2017 Recommendation was considered at the Commission’s June 28, 2017 B&E. Chairman Skrmetta made a motion to accept the 06/09/2017 Recommendation. Commissioner Campbell made a substitute motion to accept the law as stated by the Legislature in Act 278.¹ The substitute motion was seconded by Commissioner Boissiere, with Chairman Skrmetta and Commissioner Baldone opposing and Commissioner Francis recusing himself due to a conflict of interest. The motion failed with a 2:2 vote. Chairman Skrmetta re-urged his original motion. The motion was seconded by Commissioner Baldone, with Commissioner Campbell and Commissioner Boissiere opposing and Commissioner Francis recusing himself due to a conflict of interest. The motion failed with a 2:2 vote.

At the request of Commissioner Francis, Staff’s 06/09/2017 Recommendation was reconsidered at the September 20, 2017 B&E. On motion of Chairman Skrmetta, seconded by Commissioner Francis, with Vice Chairman Boissiere and Commissioner Baldone concurring and Commissioner Campbell absent, the Commission voted to reconsider the matter. On motion of Chairman Skrmetta, seconded by Commissioner Francis, with Vice Chairman Boissiere and Commissioner Baldone concurring and Commissioner Campbell absent, the Commission voted to adopt Staff’s Amended Final Recommendation and Draft Rules and Regulations filed June 9, 2017. The Commission’s vote to adopt Staff’s Amended Final Recommendation and Draft Rules and Regulations filed June 9, 2017 was memorialized as General Order dated October 18, 2017.

At the request of Commissioner Campbell, the Commission voted at the December 20, 2017 B&E to reconsider and/or modify the Commission’s existing waste hauling rules and

¹ On June 15, 2017, Act No. 278 of the 2017 Regular Session of the Louisiana Legislature (“Act 278”) was signed by Governor John Bel Edwards. Act 278 removed statutory provision within Title 45 of the Louisiana Revised Statutes that referenced the requirement for Commission regulated carriers to prove PC&N.

regulations, as established by the General Order dated October 18, 2017, to be consistent with the procedure established by Act 278 of the 2017 Regular Session of the Louisiana Legislature, relative to motor carriers and common carrier certificates or contract carrier permits issued by the LPSC.

II. Jurisdiction

Article IV, Section 21 (B) of the Louisiana Constitution of 1974 grants the LPSC constitutional jurisdiction over common carriers, and specifically provides as follows,

“The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.”

The Louisiana Supreme Court has repeatedly held that the above-referenced provision gives the Commission exclusive, plenary power to regulate all common carriers and public utilities. Furthermore, acts or omissions of the Legislature cannot subtract from the Commission's power. Global Tel Link, Inc. v. Louisiana Public Service Commission, 97-0645, pp. 6-7 (La. 1/21/98), 707 So. 2d 28, 33; Bowie v. Louisiana Public Service Commission, 627 So. 2d 164 (La. 1993). The Commission's power in this regard is as complete in every respect as the regulatory power that would have been vested in the legislature in the absence of Art. IV § 21 (B.) Bowie.

III. Commission Action:

This matter was brought before the Commission for reconsideration at the December 20, 2017 Business and Executive Session. Commissioner Campbell made a motion, seconded by Vice Chairman Boissiere to: A) repeal the General Order dated 10/18/2017 regarding Docket No. R-34054; B) adopt the proposed staff recommendation filed in Docket No. R-34054 on 8/3/2016, with regard to Section III, titled Conclusions and Recommendations, as amended, to the Commission's Rules of Practice and Procedure; C) that all future Commission and Staff action be applied in a manner consistent with Act 278, which was effective on June 15, 2017, and essentially adopted the language of the August 3, 2016 proposed staff recommendation; and D) that this order shall apply to all pending applications.

Chairman Skrmetta made a substitute motion to reject Commissioner Campbell's motion, seconded by Commissioner Francis, and opposed by Vice Chairman Boissiere, Commissioner Campbell and Commissioner Greene.

After discussion and argument from counsel representing various intervenors in the rulemaking, Commissioner Campbell re-urged his original motion, which was seconded by Vice Chairman Boissiere, with Chairman Skrmetta and Commissioner Greene concurring and Commissioner Francis opposing. The motion passed 4:1.

IT IS THEREFORE ORDERED THAT:

The Commission, by way of this Order, adopts Staff's August 3, 2016 Conclusion and Recommendation, with amendments, attached hereto and made part hereof as Exhibit A, which applies to all applications for waste hauling authority.

This Order is effective immediately.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA**

January 23, 2018

/S/ ERIC F. SKRMETTA

DISTRICT I

CHAIRMAN ERIC F. SKRMETTA

/S/ LAMBERT C. BOISSIERE

DISTRICT III

VICE CHAIRMAN LAMBERT C. BOISSIERE

/S/ FOSTER L. CAMPBELL

DISTRICT V

COMMISSIONER FOSTER L. CAMPBELL

OPPOSED

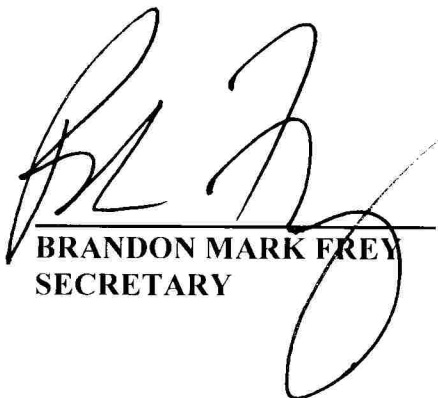
DISTRICT IV

COMMISSIONER MIKE FRANCIS

/S/ CRAIG GREENE

DISTRICT II

COMMISSIONER CRAIG GREENE



**BRANDON MARK FREY
SECRETARY**

LOUISIANA PUBLIC SERVICE COMMISSION

DOCKET NO. R-34054

LOUISIANA PUBLIC SERVICE COMMISSION, EX PARTE

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Conclusion and Recommendation

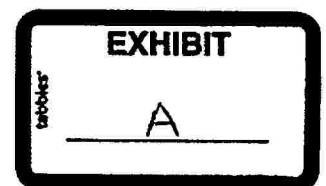
In light of the present maturity of the waste transportation industry and substantially changed economic conditions, Staff recommends that more weight be given to the benefits of healthy competition and protecting the public health, safety and welfare and less weight be given to protecting the economic interests of existing carriers.¹ Staff recommends that the Commission take the following three actions:

1) order the following:

No motor carrier of waste shall operate as a common carrier or contract carrier without first having obtained from the Commission a common carrier certificate or a contract carrier permit.

Waste is classified as non-hazardous oilfield waste, non-hazardous industrial solid waste, or hazardous waste. "Non-hazardous oilfield waste" means waste defined as non-hazardous oilfield waste or exploration and production waste by the Louisiana Environmental Quality Act, La. R.S. 30:2001 et seq., and regulations adopted pursuant thereto disposed of at facilities not owned or operated by said transporters. "Non-hazardous industrial solid waste" means waste defined as non-hazardous industrial solid waste by the Louisiana Environmental Quality Act, La. R.S. 30:2001 et seq., and regulations adopted pursuant thereto disposed of at facilities not owned or operated by said transporters. "Hazardous waste" means waste defined as hazardous waste by the Louisiana Environmental Quality Act, La. R.S. 30:2001 et seq., and regulations adopted pursuant thereto disposed of at facilities not owned or operated by said transporters.

¹ See *Assure Competitive Transp., Inc. v. U.S.*, 635 F.2d 1301, 1305 (7th Cir. 1980).



2) repeal and re-enact Rule 33 as follows:

RULE 33: APPLICATIONS FOR AUTHORITY TO TRANSPORT NON-HAZARDOUS OILFIELD WASTE, HAZARDOUS WASTE, AND NON-HAZARDOUS INDUSTRIAL SOLID WASTE.

A. An applicant applying for a common carrier certificate, contract carrier permit, or expansion of authority granted in an existing certificate or permit authorizing the transportation of non-hazardous oilfield waste, hazardous waste or non-hazardous industrial solid waste shall prove fitness² in a hearing before an administrative law judge or hearing officer by proving that the applicant:

1. holds, or is capable of acquiring, an insurance policy providing coverage of two hundred fifty thousand dollars for injury or death per person or five hundred thousand dollars per occurrence, and ten thousand dollars property damage,

2. has the financial ability to provide the transportation of waste for disposal in a safe and efficient manner,

3. holds, or is capable of acquiring, all of the necessary authorizations required by any and all regulatory authorities for the transportation of waste for disposal;

4. holds, or is capable of acquiring for use, equipment and man power to provide transportation services in a safe and efficient manner, and

5. has in place, or is capable of establishing, a safety program necessary for the safe and efficient transportation of waste for disposal.

B. Repudiation of the Pan American Test and Its Progeny

The Commission has found that public convenience and necessity is “dynamic and flexible” and that the test established in *Pan-American Bus Lines Operations*, 1 M.C.C. 190 (1936) is no longer applicable to the trucking industry as it exists today and to the needs of the shippers for the transportation and disposal of waste in Louisiana. Therefore, the test for evaluating and proving public convenience and necessity found in *Pan American* and subsequently followed by the Louisiana Supreme Court in *Matlack, Inc. v. LPSC*, 622 So.2d 640 (La. 1993) and its progeny is hereby rejected.

C. Discovery

Any party may conduct discovery regarding any issue that is relevant to the subject matter of the docketed proceeding, as long as the requested information is not privileged. The scope of discovery includes, but is not limited to, all information related to any books, documents, or other tangible items, and the identity and location of any person having knowledge of any discoverable information. A party shall not object to any discovery

² See R.S. 45:164(B) [page 3, line 6 of Act 278 of the 2017 Regular Session of the Louisiana Legislature]

request if the information sought is reasonably calculated to lead to the discovery of evidence that would be admissible at a hearing.

D. The provisions of this rule are applicable to all applications for common carrier certificates and contract carrier permits of waste and all applications for expansion of existing waste authority, including those applications which are presently pending before the Commission but have not yet gone to hearing on the merits.

E. All restrictions on existing certificates or permits are valid until expansion of authority is applied for and a new certificate or permit is granted. However, any restrictive language in any existing common carrier certificate or any contract carrier permit of waste that prevents the carrier from applying for expanded authority for any period of time is null and void.³

F. Certificates or permits issued after the adoption of this rule shall not contain restrictions.

3) repeal and enact Rule 34 as follows:

RULE 34: EVIDENCE IN UNCONTESTED PROCEEDINGS

In any uncontested proceeding, the Commissioner shall receive, without regard to the legal rules of admissibility, any evidence of a form and character which would ordinarily be relied upon by a prudent person in an ordinary business transaction, including, without limitation, affidavits, documents and other forms of hearsay testimony deemed by him to be reliable.

~~In an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity may be met through the testimony of the applicant, if he/she/it is knowledgeable about the transportation services available, the needs of the shipping public and the capability and fitness of the applicant and need not be supported by shipper affidavits.~~

³ See Section 3 of Act 278 of the 2017 Regular Session of the Louisiana Legislature [page 4, lines 1-4]

